IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 9.3.2006

Coram:

The Hon'ble Mr.JUSTICE S.RAJESWARAN

W.P.No.33961 of 2003

Arya Vaidya Nilayam
Rep. by its Managing partner
Mr.Ramesh R.Varier
175-A, Vilachery Main Road
Madurai-625 004 .. Petitioner

vs.

Assistant Provident Fund Commissioner
Employees' Provident Fund Organisation
Sub-Regional Office
Lady Doak College Road
Madurai-625 002 .. Respondent

Writ Petition filed under Article 226 of the Constitution of India seeking to issue a writ of certiorari as stated therein.

For Petitioner : Mr.R.Parthiban
For Respondent : Mr.V.Vibishanan

ORDER:

The petitioner has filed this writ petition for a writ of certiorari calling for the records of the respondent in his proceedings No.TN/SRO/MDU/29451 Circle-2/PDC/LD/2003 dated 17.10.2003 and quash the same.

2. The brief facts stated by the petitioner are as follow:-
The petitioner establishment is rendering medical service and it was covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'the Act') by allotment of code number 29451. It is stated that they were remitting the P.F. Contribution amount regularly. While so, on 22.8.2003, the petitioner received a notice from the respondent stating that for the period from April 1991 to August 1995, the petitioner had remitted the contribution belatedly and hence a sum of Rs.58,107/- is being levied towards damages under Sec.14B

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of the Act. Because of the notice being sent after 10 years of the relevant period, the petitioner was not able to immediately remember the details. However the petitioner replied on 30.8.2003 to the respondent pointing out the inordinate delay on the part of the respondent in initiating action under Sec.14B of the Act and expressed the inability of the petitioner to ascertain the correctness of the details of the alleged delayed payment. Therefore the petitioner requested the respondent to drop further proceedings. However the respondent fixed a personal hearing on 13.10.2003 vide the notice dated 25.9.2003. It is stated that the General Manager of the petitioner establishment attended the personal hearing and explained the difficulties to remember the reasons for the alleged delayed payment and requested to view the matter leniently. It is also stated that however by order dated 17.10.2003 the petitioner was directed to remit the amount of Rs.58,107/- towards damages under Sec.14B of the Act. Challenging this order, this writ petition has been filed.

3. The respondent-department has filed a counter and stated that the petitioner is liable to remit the payment as per the provisions of the Employees' Provident Funds Scheme, 1952 within 15 days of close of every month. Since there was a belated remittance for the period from 1.4.1991 to August 1995, a notice dated 22.8.2003 was issued to the petitioner intimating the amount of damages payable by them. The petitioner was requested in the said notice to respond within a week's time. The petitioner submitted a letter on 30.8.2003 stating that the inordinate delay in levying the penal damages had given rise to the inference that the delayed remittances had been condoned by the office of the Organisation. It is also stated in the said reply dated 30.8.2003 that the damages had been calculated mechanically and excessively. Pursuant to the letter dated 25.9.2003 issued by the respondent department calling upon the petitioner to attend a personal hearing, the General Manager (Admn.) appeared on 13.10.2003 before the authorities. During the course of enquiry, the General Manager represented that the leviable damages be waived as it was a service oriented Organisation. It was also stated by him that the petitioner had come voluntarily under the purview of the Act and was subscribing. Therefore, he requested the Department to be considerate and drop the proceedings. Since the Department did not accede to the request, they filed the above writ petition for the aforesaid relief.

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4. Learned counsel for the petitioner submitted that the proceedings of the respondent are quasi-judicial in nature and hence the principles of natural justice have to be complied with. He also submitted that even though no period of limitation is prescribed under the Act for initiation of proceedings under Sec.14B of the Act, it is settled law that inordinate delay in commencing the action resulting in prejudice to the employer, would render such proceedings invalid. The primary contention of the learned counsel for the petitioner is that on the sole ground of inordinate delay in initiating action, the impugned order will have to be set aside. In the course of the argument, learned counsel has relied on the decision in Hindustan Times Ltd. v. Union of India & Ors., 1980-I-LLJ 72 in support of his contention and reiterated that the authority under Sec.14B of the Act has to apply his mind to the facts of the case and to the reply to the show cause notices and pass a reasoned order after following the principles of natural justice, giving a reasonable opportunity of being heard. According to him, the long delay has caused grave prejudice to the employer. Therefore, applying the law laid down by the said decision, the learned counsel submitted that the impugned order will not stand the legal scrutiny and hence prayed for quashing the impugned order.

5. According to the learned counsel for the respondent, this writ petition is not maintainable either in law or on facts and the same is liable to be dismissed. It is submitted by him that the petitioner without exhausting the alternative remedy of filing appeal before the appellate authority has filed this writ petition. According to the learned counsel, the petitioner establishment was covered with effect from 1.4.1991 statutorily and voluntarily as the petitioner employed 23 persons on 1.4.1991. Since they failed to remit the dues from the date of coverage within the date specified under the scheme, a notice dated 22.8.2003 was issued for collecting the damages. Learned counsel further reiterated that action has been initiated only in pursuant to the Act and the Scheme and there is absolutely no illegality warranting interference by this court. Therefore, he prayed for dismissal of the writ petition.

6. Heard the learned counsel for the petitioner as well as the learned counsel for the respondent. I have also perused the documents filed in support of the writ petition.

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7. I find that in reply to the notice dated 22.8.2003 issued by the respondent-department, the Managing Partner of the petitioner replied on 30.8.2003 stating that due to efflux of time they are unable to ascertain the details of payments as mentioned in the respondent's letter and also unable to remember the reasons for the late remittance and due to the belated action, they have been seriously prejudiced. It is also stated that the inordinate delay on the part of the respondent would give rise to the inference that they have condoned the delayed remittance and taken a decision not to recover any damages from them. It is also stated by the the Managing Partner of the petitioner that the damages have been calculated mechanically and excessively and therefore the petitioner wanted to drop the proceedings initiated against the petitioner. Besides that on 13.10.2003, Mr.Unnikrishnan, the General Manager (Admn) appeared before the authorities and represented that the leviable damages could be waived as it is a service oriented Organisation. A reading of the impugned order would show that the petitioner-organisation have not pleaded any prejudice of irretrievable nature excepting to say that the delayed action of the respondent-department has caused prejudice to them in not being able to remember the reasons for the delayed remittance and they have not added anything more.

8. Moreover, in the judgment 1998-I L.L.J. 72 (Hindustan Times Ltd. vs. Union of India & others) relied on by the learned counsel for the petitioner, the Hon'ble Supreme Court has held as follows;-

> "26. From the aforesaid decisions, the following principles can be summarised. The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power cut, financial problems relating to other indebtedness or the delay in realisations of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to

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escape liability, there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B. The fact that proceedings are initiated or demand for damages is made after several years cannot by itself be a ground for drawing an inference of waiver or that the employer was lulled into a belief that no proceedings under Section 14-B would be taken, mere delay in initiating action under Section 14-B cannot amount to prejudice inasmuch as the delay on the part of the department, would have only allowed the employer to use the moneys for his own purposes or for his business especially when there is no additional provision for charging interest. However, the employer can claim prejudice if there is proof that between the period of default and the date of initiation of action under Section 14-B, he has changed his position to his detriment to such an extent that if the recovery is made after a large number of years, the prejudice to him is of an "irretrievable" nature; he might also claim prejudice upon proof of loss of all the relevant records and/or non-availability of the personnel who were, several years back in charge of these payments and provided he further establishes that there is no other way he can reconstruct the record or produce evidence; or there are other similar grounds which could lead to "irretrievable" prejudice; further, in such cases of "irretrievable" prejudice, the defaulter must take the necessary pleas in defence in the reply to the show cause notice and must satisfy the concerned authority with acceptable material; if those pleas are rejected, he cannot raise them in the High Court unless there is a clear pleading in the writ petition to that effect."

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9. In Hindustan Times case (supra) relied on by the petitioner, the Hon'ble Supreme Court illustrated some of the grounds which could lead to irretrievable prejudice that may be caused due to delay on the part of the respondents in initiating action under Sec.14-B of the Act. As per the Apex Court, the employer can claim prejudice of irretrievable nature (i) if he is able to prove that between the period of default and the date of initiation of action under Sec.14-B, he has changed his position to his detriment; (ii) if he is able to prove the loss of all the relevant records; (iii) if he is able to prove the non-availability of the personnel who were several years back in charge of these payments provided the employer further establishes that there is no other way he can reconstruct the record or produce evidence. These three grounds are illustrative and there could be similar other grounds. The Supreme Court further held that even such cases of irretrievable prejudice, the defaulter must take necessary pleas in defence in reply to the show-cause notice and must satisfy the authorities concerned with acceptable material. If in spite of all these, the authority rejects the plea of irretrievable prejudice, the same can be raised in the writ petition with clear pleading of irretrievable prejudice.

10. In the light of the categorical findings of the Supreme curt, let me test the reply dated 30.8.2003 given by the petitioner to the respondent's show cause notice dated 22.8.2003. The reply dated 30.8.2003 is as follows:-

> "In your letter you have pre-determined the matter in the first page and required us to remit the damages immediately. However, in the last page of your letter, you have mentioned that opportunity of being heard would be given.
> Due to efflux of time, we are unable to ascertain the details of payments as mentioned in your letter and also unable to remember the reasons for the late remittance. Due to your belated action, we have been seriously prejudiced.
> The in-ordinate delay on your part would also give raise to the inference that you have condoned the delayed remittance and that you have decided not to recover any damages from us.
> More over the amount of damages in your letter have been calculated mechanically and excessively.

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So we request you to kindly to accept our above explanation and to drop further action on this matter."

The reasons given in the reply is that due to efflux of time, they are unable to ascertain the details of payment and they are also unable to remember the reasons for the late remittance. The petitioner did not explain as to why they are unable to ascertain the detail and why they are unable to remember the reasons to be prejudiced irretrievably. By merely saying that by efflux of time they are seriously prejudiced, they cannot escape the initiation of action under Sec.14-B. Even before the respondent when appearing in person by the General Manager on 13.10.2003, no evidence was let in nor any documents filed to prove that irretrievable prejudice caused to them due to the delay. On the contrary, the General Manager only pleaded for waiver of damages as it is a service oriented organisation. Therefore the judgment relied on by the learned counsel for the petitioner is not helpful to him and I hold that the impugned order is not vitiated merely on the ground of delay.

11. For the foregoing reasons, this writ petition is dismissed. Consequently the connected W.P.M.P. is also dismissed. No costs.

sks

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. Assistant Provident Fund Commissioner
Employees' Provident Fund Organisation
Sub-Regional Office
Lady Doak College Road
Madurai-625 002

+ one cc to Mr. R. Parthiban, Advocate sr no. 11685
+ one cc to Mr. V. Vibhishanan, Advocate sr no. 11587

PPV(CO)
NM(12.04.2006)

Pre-delivery order,
W.P.33961/03.

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